STATE OF MICHIGAN

IN THE SUPREME COURT

STAND UP FOR DEMOCRACY,

Plaintiff-Appellee

v

Court of Appeals No. 310047

Supreme Court No. 145387

BOARD OF STATE CANVASSERS,
RUTH JOHNSON, in her Official Capacity as
Secretary of State for the State of Michigan,

Defendant,

CITIZENS FOR FISCAL RESPONSIBILITY,

Intervening Defendant-Appellant
_____/

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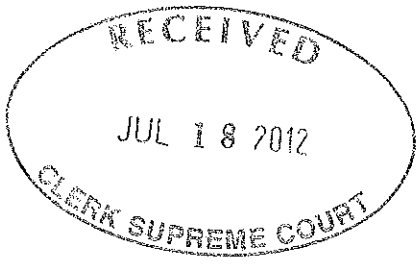
**AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN IN OPPOSITION TO APPEAL**



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## STATEMENT OF QUESTION PRESENTED

Amicus Curiae adopts and incorporates by reference the Statement of Question Presented and the responses as framed and presented by Plaintiff.

## STATEMENT OF FACTS

Amicus Curiae adopts and incorporates by reference the facts as presented by Plaintiff.

## INTEREST OF AMICUS CURIAE

The American Civil Liberties Union Fund of Michigan is the Michigan affiliate of a nationwide nonpartisan organization of nearly 500,000 members dedicated to protecting the liberties and civil rights guaranteed by the United States Constitution. The ACLU is widely recognized as one of the foremost defenders of voting rights. More generally, the organization has an unswerving commitment to the preservation of a democratic society. We believe that this case presents an important challenge to an arbitrary and legally unsound decision by the Michigan Board of Canvassers that threatens the fundamental tenets of democracy. We further believe that our amicus brief will bring additional authorities and perspectives to the attention of the Court.

## ARGUMENT

### I. ANY CHANGE IN RULES FOR PLACING INITIATIVES ON THE BALLOT WILL DEPRIVE PLAINTIFF OF DUE PROCESS AND AN OPPORTUNITY TO COMPLY

An aroused citizenry, concerned that they are being locked out of the political process, gathered more than 200,000 petition signatures in their efforts to have the public determine whether the Local Government and School District Fiscal Accountability Act (Public Act 4) should be retained or repealed. When the Michigan Board of State Canvassers deadlocked on a challenge to the size of the type on parts of the petition documents and then declined to certify

the petitions, Plaintiff Stand Up for Democracy initiated this action and prevailed in the Court of Appeals.

The Intervening Defendant, Citizens for Fiscal Responsibility, filed this appeal and essentially asks this Court to change the rules for placing measures on the ballot. This will deny Plaintiff and others any reasonable measure of due process, notice and opportunity to comply with the new rule.

MCL 168.482(2) provides, in relevant part, "If the measure to be submitted proposes a constitutional amendment, initiation of legislation, or referendum of legislation, the heading of each part of the petition shall be prepared in the following form and printed in capital letters in 14-point boldfaced type. . . . "In the years since the statute's enactment, technology has evolved and the widespread use of personal computers has been accompanied by the availability of various type fonts that are almost universally familiar to those who engage in any form of word processing.

MCL 168.482 contains no definition of the term "14-point." Consequently, there have been groups, including the plaintiff in this case, that have relied on the statute's language and, in good faith, proffered and used petitions printed in fonts with characters that meet the font's "14-point" standard and/or the criteria used by a printer to determine that the 14-point requirement has been satisfied. In the absence of any statutory language suggesting that they should do otherwise when presented with a document that contains print that (according to printers' affidavits) is "14-point," the Board of Canvassers has approved these petitions as to form.[1]

[1] The Board of Canvassers "Answer to Application for Leave to Appeal," at p. 26 states: "As of July 9, 2012, six additional petitions proposing various initiatives have been filed with the Secretary of State. At this time, it is unclear whether the type size of the headings on these petitions measure 14-point type under either the "E" scale point sizes or the point scale ruler. While the form of these petitions was previously approved by the Board of Canvassers, the

The record lacks any complaint by any petition signer about their inability to read or understand petitions because the print was in "Calibri" rather than "Times New Roman" or another font. In any font, 14-point type is probably large enough to satisfy the objective of ensuring that petition language is not hidden in fine print and that petition signers are able to read and understand the document they sign. It should therefore come as no surprise that, notwithstanding technological developments, the legislature has not seen fit to amend MCL 168.482 to include a definition that specifies acceptable computer fonts for petitions. To do so would create not only the need for an exhaustive list of all known acceptable fonts, and the corresponding risk that certain otherwise acceptable fonts will be overlooked and excluded, but also a continuing need for amendment as new fonts are developed.

The Board of Canvassers has instituted a practice of approving petitions as to form regardless of the font used, as long as the petitions are accompanied by a printer's affidavit that certifies that the type is 14-point.[2]

> Traditionally, the Bureau of Elections has simply accepted the printer's affidavits filed with the petitions at face value so long as the affidavit itself is in the proper form. That was true with respect to Plaintiff's affidavit from Mr. Hack and the many other petitions the Board has approved as to form for this election cycle. [Board of Canvassers "Answer to Application for Leave to Appeal," p. 18]

Reliance on this practice by Plaintiff and others means that a decision by this Court in this case to change the requirements will have unexpected detrimental consequences for petition circulators who have not only received no advance notice, but who have also had no reason to

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Board must meet in late August or early September to certify the petitions as sufficient or insufficient for placement on the November 2012 general election ballot."

[2] At page 26 of the Board of Canvassers "Answer to Application for Leave to Appeal," it is stated: "The State Defendants generally accept printer's affidavits as accurate unless there is an obvious discrepancy. Its utility is obvious, in that normally it forestalls debate or conflict before the Board of State Canvassers with respect to these mundane formatting requirements."

believe that they have not been in full compliance with what traditionally has been requested and expected by the Board of Canvassers.

Thus, this court faces the prospect of denying thousands of Michigan residents an opportunity to participate in an election when they have reasonably complied with all rules and procedures known to them.

While the procedures and rules established and followed by the Board of Canvassers are not binding on this court, it has also been acknowledged that an agency's construction and implementation of a statute can be useful to the court and should be given "respectful consideration" if not deference. (See: *In re Complaint of Rovas against SBC Michigan v. Public Service Commission*, 482 Mich 90; 754 NW 2d 259 (2008).

Although the Secretary of State and the Board of Canvassers have expressed a willingness to be guided by the court, the court should also be mindful of the fact that rules, practices and procedures that have been established and implemented by the Board regarding the 14-point requirement have not only been effective, but also regarded as rules upon which Plaintiff and others could rely in order to be in full compliance. To change these well accepted rules after the signatures have been collected and submitted would deprive Plaintiff and other petitioners in their shoes of due process and an opportunity to comply with the new rule.

## II. MICHIGAN'S RESIDENTS ARE ENTITLED TO THEIR CONSTITUTIONALLY GUARANTEED RIGHT TO A DIRECT LEGISLATIVE VOICE

Under existing rules, Plaintiff fully complied with the 14-point requirement for all of the reasons discussed in the preceding section. Although the Court of Appeals reached a different factual conclusion regarding full compliance, it nevertheless held that under *Township of Bloomfield v. Oakland County Clerk*, 253 Mich App 1 ; 654 NW2d 610 (2002) Plaintiff's

substantial compliance entitled Plaintiff to the requested writ of mandamus. Intervening Defendant requests in this appeal that the *Bloomfield* case be overturned.

Both Intervening Defendant and the Court of Appeals panel that ruled on this matter below contend that the error in *Bloomfield* is that the court failed to recognize the mandatory implications of the word "shall" in the statute's 14-point requirement. However, the *Bloomfield* court was very much aware of what the statute demands. It was, however, also aware that it would be impermissible for the court to impose a penalty (i.e., denial of the right to an election) that has not been specified by the legislature.

> [T]he township has failed to direct our attention to any section of the Michigan Election Law or any other legislative act suggesting that the filing of a technically imperfect petition necessarily precludes an election regarding the matter therein addressed. The township points only to statutes providing that an individual who violates the Michigan Election Law has committed a criminal misdemeanor… [*Id* at 22.]

It would have been clearly beyond the authority of the *Bloomfield* court to amend the election statute to include a penalty for non-compliance. This is particularly true given the fact that the very purpose of the statute is to open up the legislative process to the general public.

> Accordingly, we also apply the [substantial compliance] doctrine in this case involving imperfect petitions, absent the Legislature's instruction that a petitioned-for election will be precluded unless the initiating petitions exactly match the Michigan Election Law requirements for form and content. [*Id.* at 23.]

The court was not authorized to amend legislation, and *Bloomfield* was properly decided.

Intervening Defendant and others who suggest that denial of the opportunity for election is an appropriate response to clerical errors lack any sense of the gravity and importance of democracy. The very first provision of the Michigan Constitution states: "All political power is

inherent in the people. Government is instituted for their equal benefit, security and protection." Const 1963, art 1, §1.

Reserving power for the people in the Michigan Constitution as a first order of business was no accident, as evidenced by article 2, section 9, which reserves to the people the power of initiative. As one commentator suggested:

> In the last analysis, the people are the fountainhead of law in a democracy, and therefore, it is natural that the legislative article should contain a reservation by the people of the right to make laws directly, through use of the statutory initiative and referendum. The initiative and referendum provisions assure the citizenry of a gun-behind-the-door to be taken up on those occasions when the legislature itself does not respond to popular demands.[3]

The courts have consistently ruled in matters involving both statewide and local direct legislation that ". . .all doubts as to technical deficiencies or failure to comply with the exact letter of procedural requirements in petitions. . . are resolved in favor of permitting people to vote and express a choice on any proposal subject to election." *Settles v Detroit City Clerk*, 169 Mich App 797, 802-803; 427 NW 2d 188 (1988); *Meridian Twp v East Lansing*, 101 Mich App 805; 300 NW2d 703 (1980), lv den 411 Mich 962 (1981). Clearly then, even if the *Bloomfield* court had been authorized to create a penalty for non-compliance, denying voters the opportunity for direct legislation would not have been an appropriate penalty.

The importance of referenda is well illustrated by the underlying issues in this case. The proposed referendum concerns Public Act 4. This law authorizes the executive branch to -- under specified circumstances -- determine that local government entities are in a "financial emergency." When that determination has been properly made, the executive must appoint an

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[3] Lederle, *The Legislature Article*, in Pealy (ed.), The Voter and the Michigan Constitution in 1958 (1958), p. 47 (as quoted in *Kuhn v Dept. of Treasury*, 384 Mich 378, 385 n 10; 183 NW 2d 796, 799 (1971).)

"emergency manager" with authority to do everything from removing elected officials from office to exercising sole authority in the adoption, amendment and enforcement of ordinances. A law of this kind that places such broad powers in the hands of a single individual, and displaces elected officials should be subject to the check and balance that a referendum can provide.

Furthermore, against a historical backdrop of the imposition of emergency management on several cities that have populations that are predominantly people of color, a referendum may be the only thing that stands between a system of government that is intended to, on the one hand serve all of Michigan's residents equally, or on the other hand, maintain two systems of governance in this state: one for wealthy, predominantly white communities that retain their ability to elect their representatives and be governed by them; and another for low-income, predominantly urban communities of color, that must surrender self-government to the control of one or more emergency managers who operate under the authority of the state executive.

This case is about democratic participation in the legislative process. Plaintiff is attempting to ensure that it happens while Intervening Defendant has resorted to an attempt to lure the judiciary into erecting a roadblock before the thousands of Michigan residents who want only an opportunity for their voices to be heard.

## CONCLUSION

Plaintiff has fully complied with the statutory petition requirements, and to the extent that it has not, there has been substantial compliance. Plaintiff and the people of Michigan are entitled to their opportunity for a referendum on Public Act 4, and the ruling below by the Court of Appeals granting a writ of mandamus should be affirmed.

Respectfully submitted,

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